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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1976

No. 76-429

RICHARD L. GRAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner RICHARD L. GRAY respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on June 14, 1976, a Petition for Rehearing having been denied on August 10, 1976.

I

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court, is unreported. A copy of the Ninth Circuit's opinion appears as Appendix "A" to this Petition. A copy of the Ninth Circuit's order denying the Petition for Rehearing appears as Appendix "B" to this Petition.

II

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 14, 1976. A timely petition for rehearing was filed on June 25, 1976, and was denied by the Ninth Circuit on August 10, 1976. This Petition for a Writ of Certiorari is filed within ninety days of that date, and is therefore timely filed. See United States v. Healy, 376 U.S. 75, 77-80 (1964), and cases cited therein. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III

QUESTIONS PRESENTED

1. Whether refusal of the trial court to allow Petitioner's counsel the opportunity to make an offer of proof after sustaining a Government objection constituted error under former Federal Rule of Civil Procedure 43(c).

2. Whether refusal of the trial court to allow Petitioner's counsel the opportunity to make an offer of proof infringed on Petitioner's constitutional right to present a defense.

IV

STATUTORY PROVISIONS INVOLVED

Former Rule 43(c) of the Federal Rules of Civil Procedure, in effect at the time of the trial in District Court, provided:

> "In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness."

Federal Rule of Evidence 103 provides, in pertinent part, as follows:

"(a) Effect of erroneous ruling. -- Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the parties affected, and . . . (2) Offer of proof. -- In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."[1/] (emphasis added).

1/ The Advisory Committee's note observes that Federal Rule of Evidence 103(a) is virtually identical in form and purpose to former Federal Rule of Civil Procedure No. 43(c).

V

STATEMENT OF THE CASE

Petitioner Richard L. Gray seeks a Writ of Certiorari to have this Court review the decision of the United States Court of Appeals for the Ninth Circuit affirming his conviction on one count of conspiracy and one count of mail fraud.

Petitioner, together with Co-Defendants ROBERT DANIEL HILL and CHARLES GISH, were indicted on a ten count indictment alleging a conspiracy to commit mail, securities and wire fraud and individual counts of mail fraud and fraud in the sale of securities. On January 22, 1975, the jury returned its verdict finding Petitioner guilty on one count of conspiracy and one count of mail fraud and acquitting him on the remaining eight counts of the indictment. At the same time, Co-Defendant ROBERT DANIEL HILL was found guilty on all ten counts of the indictment and Co-Defendant GISH was found guilty on eight of ten counts of the indictment.

On February 10, 1975, Petitioner was sentenced on Counts I and VII to ninety

days of custody in a jail-type institution pursuant to 18 U.S.C. § 3651; Petitioner was sentenced on Count VII to a three year term in custody of the Attorney General, said sentence to run consecutive to that in Count I.

The majority of the evidence at Petitioner's trial was stipulated; the only substantial issue in dispute was Petitioner's state of mind. Petitioner's defense, which admitted business dealings with Co-Defendant HILL, was the contention that his dealings with HILL were made in good faith and in mistaken reliance upon the representations and actions of HILL and HILL's agents. In an attempt to establish the defense of good faith, Petitioner's counsel asked witness HALL (an unindicted co-conspirator) whether HALL had told Petitioner that there was $4,000,000.00 in backing behind Co-Defendant HILL (RT 160). A Government objection to the question on the grounds of relevancy was sustained (RT 161).2/

2/ The relevance of the question on the defense of good faith is obvious. If Petitioner had been told by Hall (an (continued)

After the objection was sustained, Petitioner's counsel attempted to make an offer of proof to the trial judge. The trial judge refused to allow Petitioner's counsel to make an offer of proof.3/

2/ (continued)

unindicted co-conspirator) -- as the question sought to elicit -- that substantial capital was behind Co-Defendant Hill, an inference of good faith could be drawn in Petitioner's favor; particularly when it was stipulated (Government"s Exhibit 85, ¶VIII) that one of Hill's companies (The First Trading Co.) had substantially no assets.

3/ The colloquy in the trial court was as follows (RT 161):

"Q [Petitioner's counsel]: Did you [Co-Conspirator Hall] tell Mr. Roussell anything about the capital that was behind Mr. Hill while that meeting was taking place or --

" Mr. Hawes [Prosecutor]: Objection as irrelevant.

" The Court: The objection is sustained.

" Mr. Horton [Petitioner's counsel below]: May we approach the bench, your Honor?

" The Court: No.

" Mr. Horton [Petitioner's counsel]: May I make an offer of proof from here?

" The Court: No."

A similar ruling was made by the trial court in the course of Petitioner's interrogation of prosecution witness CHARLES SMEAD.[4/]

VI

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE RIGHT OF A DEFENDANT IN A FEDERAL COURT TO MAKE AN OFFER OF PROOF AFTER A GOVERNMENT OBJECTION TO HIS COUNSEL'S QUESTION IS SUSTAINED.

As noted, after sustaining Government objections to questions of his counsel, the District Court refused Petitioner's counsel the opportunity to make an offer of proof. The Ninth Circuit's disposition

4/ The relevant proceedings were (RT 651):

[Question by Petitioner's counsel]

" Mr. Hawes [Prosecutor]: Objection...

" The Court: The objection is sustained.

" Mr. Horton [Petitioner's counsel]: May I approach the bench and make an offer of proof?

" The Court: No."

of the foregoing point, upholding the refusal to allow Petitioner's counsel to make an offer of proof, was as follows (Appendix "A", p. 12):

> "A court has wide discretion to deny a conference or recess when the interruption may confuse the jury or delay the trial. An offer in the presence of the jury is objectionable as an attempt to get before the jury testimony the court has already ruled to be inadmissible."

No authority was cited by the Ninth Circuit for that remarkable pronouncement and present counsel for Petitioner has found none.[5/] Petitioner had a statutory, if not a constitutional, right to make an offer of proof. See Federal Rule of Evidence 103(a)(2), [6/] restating the

5/ There is nothing in the record -- and no claim by the Government -- that Petitioner's counsel was proceeding in any manner but good faith when he attempted to make the offers of proof. Cf. In Re McConnell, 370 U.S. 230 (1962).

6/ Federal Rule of Evidence 103(a)(2) is quoted at Part IV, Page 4, supra, of this Petition.

provisions of former Rule 43(c) of the Federal Rules of Civil Procedure.[7/]

Precluding a defendant from making an offer of proof, after sustaining a Government objection, is tantamount to refusing a defendant the opportunity to present testimony, given the requirement of an offer of proof as a predicate to asserting error on appeal.[8/] There is no suggestion that, at the time in question, Petitioner's counsel was attempting to in any way obstruct the trial. The Ninth Circuit's opinion, upholding (without citing supporting authority) the actions of the trial court in refusing Petitioner the opportunity to make an offer

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7/ The provisions of former Federal Rule of Civil Procedure 43(c) are quoted at Part IV, Page 3, supra, of this Petition. The Rule was abrogated with the adoption of the Federal Rules of Evidence. See 5 Moore's Federal Practice § 43.11.

8/ The authorities are uniform to the effect that error may not be asserted on appeal predicated on improper exclusion of evidence absent a proper offer of proof in the trial court. See, e.g., United States v. Smith, 464 F.2d 222, 224 (8th Cir. 1972); Holman v. Lawlon, 362 F.2d 1, 4 (5th Cir. 1966); 5 Moore's Federal Practice, § 43.11; 1 Weinstein's Evidence § 103[03].

of proof, is even more startling when consideration is given to the appeal of Co-Defendant HILL. Rejecting the contention of Co-Defendant HILL that the prosecutor failed to disclose certain information, the Ninth Circuit's opinion stated (Appendix "A", p. 5:

> "No offer of proof was made; and in the absence of one, we cannot determine whether there could have been any prejudicial error."

The "Catch-22" reasoning of the Ninth Circuit is believed without precedent: A contention of Co-Defendant HILL was rejected because no offer of proof was made by HILL in the trial court; a contention of Petitioner GRAY, that he was refused the opportunity to make an offer of proof, was upheld on the ground that Petitioner had no right to make an offer of proof (Appendix "A", p. 12).

2. REFUSING A DEFENDANT THE OPPORTUNITY TO MAKE AN OFFER OF PROOF INFRINGES UPON A DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

In Washington v. Texas, 388 U.S. 14 (1967), this Court made explicit what had earlier been assumed: that the Constitution grants a defendant the right to present a defense. This Court held, 388 U.S. at Page 19:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Washington v. Texas, supra, 388 U.S. at 19. See also Webb v. Texas, 409 U.S. 95 (1972).

Refusing a defendant the opportunity to make an offer of proof, after sustaining objections to questions seeking to elicit a defense, is the functional equivalent of denial of the right to present a defense. Not surprisingly, every court -- state and federal -- which has passed on the question, save the Ninth Circuit below, has held that a defendant has an absolute right to make an offer of proof when proffered evidence is rejected by a trial court (see decisions cited in Part VI(3), infra).

3. THE NINTH CIRCUIT'S OPINION ON A DEFENDANT'S RIGHT TO MAKE AN OFFER OF PROOF CONFLICTS WITH THE DECISION OF EVERY OTHER STATE AND FEDERAL COURT ON THE QUESTION.

Petitioner believes that the holding of the Ninth Circuit below to the effect that Petitioner had no right to make an offer of proof is contrary to every reported state and federal decision on the subject, apart from its conflict with the Federal Rules of Civil Procedure in

effect at the time of trial. An illustration of the incongruity of the Ninth Circuit's holding may be perceived when comparing a leading case from the Fifth Circuit: Pennsylvania Lumbermen's Mutual Fire Insurance Company v. Nicholas, 253 F.2d 504 (5th Cir. 1958). In holding that a party seeking to admit evidence had an unequivocal right to make an offer of proof, and reversing the District Court for refusing to allow such an offer of proof to be made, the Fifth Circuit held, 253 F.2d at Pages 506-507:

> "Appellants also complain of the refusal of the trial court to permit them to prove or even make their proffer of proof as to certain of their other defenses. Of course any evidence they wish to tender that would tend to establish the defenses should be received by the court, and as to any which the court considers irrelevant, immaterial or otherwise improper, the parties must be given ample opportunity to put in the record a fair statement of what they intend to prove in order that

> appellate courts can intelligently pass upon the challenged ruling of the trial court." (emphasis added).

The paucity of federal cases on the subject is undoubtedly attributable to the fact that most courts have always assumed -- what the Ninth Circuit rejected here -- the absolute right of a party to make an offer of proof. The state decisions on the point are uniform to the effect that a party has a virtually unfettered right to make an offer of proof. See, e.g., Musachia v. Terry, 140 So.2d 605, 607-608 (Fla.App. 1962); State v. Johnson, 90 N.J. Super. 105, 216 A.2d 397, 399-400 (1965), aff'd State v. Johnson, 46 N.J. 289, 216 A.2d 392, 393 (1966); Estate of Vallish, 431 Pa. 88, 244 A.2d 745, 749 (1968) ["The exclusion of such proof and the refusal even to permit the formal offer of proof to be transcribed as part of the record constituted palpable error."]; People v. Camel, 10 Ill., App.3d 1022, 295 N.E.2d 270, 275 (1973) [recognizes rule but finds error not prejudicial]; Jones v. Clark, 418 P.2d 792, 798-799 (Wyo. 1966);

Vanover v. Vanover, 77 Wyo. 55, 307 P.2d 117, 122 (1957); Collins v. State, 37 Ariz. 353, 294 Pac. 625, 627 (1930) ["As we understand the law, there is and could be no rule requiring a party to first obtain the court's permission to make an offer of proof."]; State v. Davis, 155 Me. 430, 156 A.2d 392, 89 A.L.R.2d 277 (1959) [reversible error to refuse defense counsel opportunity to make offer of proof; state on appeal conceded point]; Browder v. State, 30 Tex. App. 614, 18 S.W. 197 (1892); 75 Am.Jur. 2d Trial, § 128, p. 224; 88 C.J.S. Trial, § 73, p. 179; 89 A.L.R.2d 277, 286-287.

VII

CONCLUSION

For the above reasons, it is believed that the decision of the Ninth Circuit below is not only contrary to the explicit provisions of the Federal Rules of Civil Procedure in effect at the time of Petitioner's trial, the constitutional right of Petitioner to present a defense, but also appears to be in conflict with every reported decision -- state or federal -- on the subject. For the

foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,
MICHAEL KORN
Attorney for Petitioner

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROBERT DANIEL HILL, aka Dan Hill, *Defendant-Appellant.*	No. 75-1464
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RICHARD L. GRAY, *Defendant-Appellant.*	No. 75-1343
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CHARLES GISH, *Defendant-Appellant.*	No. 75-1476

MEMORANDUM

[June 14, 1976]

Appeal from the United States District Court
for the Central District of California

Before: WRIGHT and WALLACE, Circuit Judges,
and SOLOMON,* District Judge.

Appellants Hill, Gish and Gray were convicted by a jury of several counts of conspiracy, mail fraud and securities fraud in

*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

connection with their nationwide commodity option "live beef" forward purchase and securities businesses. Hill and Gray challenged the sufficiency of the evidence to support conviction and all three appellants allege numerous trial errors. We affirm the convictions of all appellants.

I.

FACTS

In January 1973, Hill formed International Commodities Exchange, Inc. (ICE), a California corporation, to write commodity options. In the same month Hill, Gish, and one Belton Hall conducted a commodity option seminar in Phoenix, Arizona, which was attended by Gray. Options were there sold to customers.

In the following month, Gray formed in California a branch sales agency of ICE known as Valley Comco, Inc. Gish organized a similar one which had, at different times, both California and Nevada addresses.

The following April, Hill entered into a commodity exchange agreement with a Hawaii businessman. Hill represented that his options were covered by companies such as Merrill, Lynch, Pierce, Fenner & Smith. In June, Gray made a similar agreement with a Florida businessman.

Gray set up a new corporation in Arizona in July, 1973, and he then entered into a commodity exchange agreement with Hill.

Hill, Gish and Gray stipulated that between February 27, 1973, and July 7, 1973, approximately 27% of their commodities options were covered through purchase of futures contracts on margin. Although investors received confirmation reports after July 7 which represented that options were covered by future contracts, all of the options were "naked" or uncovered. During the relevant periods, ICE had neither a seat on a board of trade nor a brokerage account.

In July 1973, Hill organized "The First Trading Company" as a California corporation and, together with Gish and Gray, commenced an active campaign to sell its stock. Hill's reports on the capitalization of The First Trading Company were false and so were his representations that stock of Deeks, Inc., a Utah corporation, was actually authorized stock of The First Trading Company.

Later that summer, Hill and Gray sold "live beef" forward purchase contracts. Each defendant stipulated that in some instances the same cattle were sold more than once.

At the trial, many witnesses testified that the defendants committed many overt acts relating to the sale of commodity options, The First Trading Company "stock," and live beef forward purchase contracts.

II.

OUR FUNCTION AS A REVIEWING COURT

Each defendant asserts many errors, but essentially they ask us to grant a new trial because of specific or cumulative "unfairness". The concluding argument in Hill's appellate brief fairly represents the collective concern of appellants:

> We have been faced with the duty of setting forth facts which demonstrate not just human foibles, but deliberate misconduct and unforgiveable negligence . . . . We plead guilty to scathing criticism of some of the actors in the trial of this case, but feel entirely justified in [doing so] because our client[s] . . . [were] convicted by a judicial proceeding far, far below the standard which our judicial heritage has led us to expect.

We must review convictions with "scrupulous care" to insure the preservation of guaranteed substantive and procedural rights. *Dennis v. United States*, 341 U.S. 494, 516 (1951). Nevertheless, we are obliged to "guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser v. United States*, 315 U.S. 60, 83 (1942).

During this long trial, the judge and all counsel made some errors, and no appellant received a "perfect", error-free trial. "A defendant is entitled to a fair trial, but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619 (1953).

We have carefully reviewed the record, and we are convinced that whatever errors were committed, either singly or cumulatively, did not affect substantial rights of the defendants and do not require reversal.

III.

THE APPEAL OF HILL

The errors asserted by Hill can broadly be categorized as: (a) insufficiency of the evidence; (b) prosecutorial misconduct; (c) judicial misconduct; (d) improper instruction on the use of hearsay in a conspiracy prosecution; and (e) ineffective assistance of counsel.

A. SUFFICIENCY OF THE EVIDENCE

Hill challenges the sufficiency of the evidence to support his convictions on charges of conspiracy (Count One), stock fraud (Counts Eight through Ten), and fraudulent sale of coffee double options and live beef forward purchase contracts (Counts Two through Seven).

This contention is frivolous. The evidence of his guilt on all ten counts was overwhelming.

B. PROSECUTORIAL MISCONDUCT

Hill charges the prosecutor committed many acts of misconduct in and out of the presence of the jury. Specifically, he asserts that the prosecutor attempted to discourage a government witness from discussing the case with Hill's counsel.

It is true that a witness was told that the prosecutor wanted to be present when the witness talked to Hill's counsel, but when this information was brought to the attention of the court, the court took prompt corrective action. The court told all of the witnesses that they could talk to counsel for either party if they so desired but that no one could force them to talk to either the government or defense counsel or anyone else; that if they wanted to have their own attorney present, they could do it, but they were not required to.

In our view, this prompt action by the district court dispelled any possibility of prejudice to Hill. *See, e.g., Gregory v. United States,* 369 F.2d 185, 187-89 (D.C.Cir. 1966).

Hill contends that the prosecutor failed to disclose "understandings of agreements" for non-prosecution or other favorable treatment between the government and certain witnesses in exchange for their testimony. There is nothing in the record to

support this contention except the self-serving affidavit of Hill. No offer of proof was made; and in the absence of one, we cannot determine whether there could have been any prejudicial error. *Elder v. United States,* 202 F.2d 465, 467 (9th Cir. 1953).

Hill points to portions of the prosecutor's closing argument as grounds for reversal. Some of the prosecutor's statements were not models of clarity or accuracy, but as we said in *United States v. Gorostiza,* 468 F.2d 915, 916 (9th Cir. 1972):

> In closing arguments, both defense attorneys and prosecution attorneys are allowed reasonably wide latitude. They may strike "hard blows" based upon the testimony and its inferences, although they may not, of course, employ argument which could fairly be characterized as foul or unfair.

The prosecutor's arguments here were neither foul nor unfair, and the court instructed the jury that what counsel said in argument was not evidence. There is no merit in Hill's contention.

C. JUDICIAL MISCONDUCT

Hill argues that the court committed the "usual number of . . . erroneous evidentiary rulings," and he also asserts that there was an "overall absence of due process in this trial." We disagree.

Hill points first to the court's allowing a series of questions by the prosecutor during cross-examination of Hill. They required only "yes" or "no" answers. At least twice the court interrupted Hill who attempted to elaborate beyond a simple "yes" or "no" response.

This was cross-examination; leading questions were clearly proper. We have examined the court's rulings in the context of the questions, and we find that the court properly stopped the witness from volunteering unresponsive testimony.

Hill argues that the court "materially prejudiced Hill's right to a fair verdict" by conducting an "excessive and confusing cross-examination of Hill" for the purpose of clarifying the relationship between "First Trading Company" and "The First Trading Company".

The district court has "inherent power to control evidentiary matters." *United States v. Nobles,* 422 U.S. 225, 235 n.9 (1975).

And this inherent power includes the right to comment on the evidence and to clarify testimony when necessary. *United States v. Malcolm*, 475 F.2d 420, 427 (9th Cir. 1973).

Here, the district court helped develop testimony on the particular exchange concerning "First Trading Company" and "The First Trading Company". Its questions to Hill were extensive and detailed. In the case of an alleged securities fraud or other complicated case, it is often essential for the court to ask questions to clarify matters for the jury. We cannot say on this record that the judge's participation went beyond the bounds of propriety or was error.

Hill argues that the court erred in sustaining "on technical bases" government objections to a line of questioning by Gray's trial counsel designed to elicit additional testimony from witnesses who were recalled to the stand. The questions to which government counsel objected were improper, and the court properly sustained his objections. There was no error.

Hill next urges reversal because of the following statement of the court in response to the request of Gray's counsel that Reverend Soults be allowed to retake the witness stand:

> We've let Rev. Soults—this kind of thing of talking to witnesses after they have testified is not proper, Mr. Horton. You can get yourself in a lot of trouble doing that.

The court's comment was made outside the presence of the jury and could not have prejudiced defendants. Nor did it reflect undue bias or prejudice on the part of the court. There was no error.

D. THE INSTRUCTION ON HEARSAY EVIDENCE

Hill alleges the jury was not told the prerequisites for the admission of hearsay statements of one conspirator against his co-conspirators.

There is no merit in this contention. Both before the introduction of any evidence and at the conclusion of the case, the court instructed the jury on the circumstances which would permit a statement of an alleged co-conspirator to bind other alleged members of the same conspiracy. The court's instructions were clear, complete and correct.

E. DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Finally, Hill contends that his retained counsel did not give him reasonably effective assistance.

Many of his arguments are based on assertions made for the first time in his appellate brief and in the affidavits attached to the brief. Presentation of facts unsupported by the record are not properly part of an appellate brief and cannot be considered by this Court. Fed. R. App. P. 10(a), 28 and 30.

Hill also contends that his counsel

(1) failed to cross-examine government witnesses sufficiently;

(2) failed to call any witnesses other than the defendant himself;

(3) failed to conduct an orderly and comprehensive presentation of Hill's own testimony; and,

(4) failed to engage in adequate discovery in advance of trial.

Hill therefore asserts that he was denied his Sixth Amendment due process right to the effective assistance of counsel.

Neither at the trial nor in the motion for a new trial after the verdict did the defendant contend that he was deprived of the effective assistance of counsel. Had he made such a contention, the trial court could have held a hearing and provided us with a reviewable record.

As we said in *United States v. Johnson*, 434 F.2d 827, 831 (9th Cir. 1970):

> [T]he contention of inadequate representation is not available on direct review absent a record disclosing preservation of the claimed error in the trial court unless the inadequacy of representation was . . . gross on the face of the record . . . .

Defendant must overcome the presumption that his counsel was competent, and defendant has the burden to demonstrate that the alleged deprivation was of constitutional dimensions. *McQueen v. Swenson*, 498 F.2d 207, 214 and 216 (8th Cir. 1974).

We must bear in mind that an attorney has the "basic right and implied authority . . . to conduct the defense in such manner as he sees fit." *United States v. Cox*, 439 F.2d 86, 88 (9th Cir. 1971).

An attorney's decisions are not to be judged incompetent or ineffective merely because hindsight suggests that different and perhaps better decisions might have been made. *United States v. Wilkes*, 449 F.2d 163 (9th Cir. 1971).

Whether we apply the standard "farce or mockery of justice" (*United States v. Gomez*, 523 F.2d 185, 186 (9th Cir. 1975)), or "failure to render reasonably effective assistance" (*Hayward v. Stone*, 527 F.2d 256, 257 (9th Cir. 1975)), the appellant has failed in his burden to demonstrate that his constitutional rights were violated.

We have rejected specific ineffective assistance claims similar to those raised by Hill. *See United States v. Jones*, 512 F.2d 347, 349 (9th Cir. 1970) (failure to call co-defendant to the witness stand); *Borchert v. United States*, 405 F.2d 735, 738 (9th Cir. 1968) (failure to call enough witnesses on defendant's behalf); *United States v. Holman*, 436 F.2d 863, 868-69 (9th Cir. 1970) (failure to investigate fully).

The performance of Hill's trial counsel was no model of excellence in advocacy. But that is not the standard that an attorney is required to meet under penalty that his client will be entitled to a new trial if he is convicted.

The evidence of Hill's guilt was overwhelming. At no time has he suggested how the outcome of the trial would have been different had he retained a different attorney.

The convictions of Hill are affirmed.

IV.
APPEAL OF GISH

Gish assigns error in the:

(a) denial of the right to examine and cross-examine witnesses;

(b) abridgment of his privilege against self-incrimination;

(c) improper exclusion of relevant evidence; and

(d) improper instruction on conspiracy.

A. DENIAL OF THE RIGHT TO EXAMINE AND CROSS-EXAMINE WITNESSES

Gish asserts that it was error to deprive him of the opportunity to cross-examine defendant Hill and to call defendant Hill as his own witness.

Hill testified at the trial, and his testimony tended to exculpate Gish.

Hill, during his direct testimony, made no mention of the January 27, 1973, commodity option seminar. Counsel for Gish attempted to pursue that subject on cross-examination, but was stopped when the court sustained the prosecutor's objection.

The prosecutor, without objection, cross-examined Hill about the seminar. Thereafter, the court invited further cross-examination. Counsel for Gray accepted the invitation and did cross-examine Hill, but counsel for Gish elected not to ask Hill any other questions.

Once the subject matter was opened by the prosecutor, Gish's counsel was free to inquire into it. His failure to do it was his own decision and is no ground for reversal.

The court's ruling prohibiting Gish from calling co-defendant Hill as a witness was proper.

Hill, when he testified on his own behalf, waived his privilege against self-incrimination on "all other relevant facts" which could be elicited on cross-examination. *Johnson v. United States*, 318 U.S. 189, 195 (1943). But Hill did not waive his right to refused to be called on direct examination by either the prosecutor or a co-defendant. A defendant has an absolute right not to be called as a witness at his own trial. *Garner v. United States*, 501 F.2d 228, 238 (9th Cir. 1972) (en banc), *aff'd on other grounds*, ____ U.S. ____, 44 U.S.L.W. 4323 (Mar. 23, 1976). By voluntarily taking the witness stand and testifying on his own behalf, a defendant does not waive the correlative but distinct right to refuse subsequent compulsory process.

A co-defendant must take advantage of a defendant's election to testify by means of searching cross-examination and may not thereafter call a defendant, over his objection, on direct examination.

B. ABRIDGMENT OF GISH'S PRIVILEGE AGAINST SELF-INCRIMINATION

Gish argues that his privilege against self-incrimination was abridged when the court overruled his objection to the prosecutor's question, "Did you, sir, on Oct. 16, 1974, apply for a U.S. passport under the fictitious name Bruce Christeson Page?" Gish's counsel failed to assert the privilege. He merely said, "Objection, your Honor." And when the court answered, "The objection is overruled," Gish's counsel did not set forth the reasons for the objection, and Gish answered, "Yes sir, I did."

The question was proper. Evidence of the use of a false name was admissible as a prior inconsistent statement. *See Asher v. United States,* 394 F.2d 424 (9th Cir. 1968), *United States v. Pistante,* 453 F.2d 412 (9th Cir. 1971). It was also admissible as evidence of attempted flight. *Shorter v. United States,* 412 F.2d 428 (9th Cir. 1969).

Even if Gish could have invoked the privilege against self-incrimination to avoid answering the prosecutor's question, he failed to do it when he merely said, "Objection," without stating any legal ground. One who desires the protection of the privilege must claim it. *United States v. Monia,* 317 U.S. 424 (1943).

C. IMPROPER EXCLUSION OF RELEVANT EVIDENCE

Gish asserts that the refusal of the court to admit a document from the Livestock Advisory Service on predictions of live beef cattle prices between August 1973 and March 1974 was error. Gish asserts that it was admissible to show that he believed the representations he made to his customers.

This exhibit was probably inadmissible, and at best it was merely cumulative because Gish was permitted to testify that he relied on a memorandum from Hill and on a *Wall Street Journal* article. The exclusion of the exhibit could not be more than harmless error.

D. IMPROPER INSTRUCTION ON CONSPIRACY

This assignment is based on Gish's contention that there was more than one conspiracy and that the testimony of Hill and

Gray subjected him to "[t]he dangers of transference of guilt from one [defendant] to another across the line separating conspiracies." *Kotteakos v. United States,* 328 U.S. 750, 754 (1945).

There is no merit in this contention. We believe that the evidence showed only one conspiracy, and we hold that the district court properly instructed the jury on this assumption.

V.

APPEAL OF GRAY

Gray asserts some of the same errors as the other two appellants, and he also alleges that the evidence was insufficient as to him, that the court made erroneous evidentiary rulings, and was guilty of misconduct. He also asserts that the prosecutor was guilty of misconduct.

A. INSUFFICIENCY OF THE EVIDENCE

Gray asserts that the evidence was insufficient as to him both on the conspiracy count and the mail fraud count.

We have already pointed out that the evidence on the conspiracy count against all three appellants was overwhelming.

On the mail fraud count, the testimony and other evidence on the Barnes transactions amply supported conviction on that count. Gray promised Barnes that he would repay the funds Barnes invested, and, in addition, Gray mailed a letter to Barnes suggesting that the return of Barnes' investment would be forthcoming. This evidence was sufficiently probative of Gray's intent to support the conviction.

B. ERRONEOUS EVIDENTIARY RULINGS

There is no merit in Gray's contention that the court made erroneous evidentiary rulings frustrated his attempt to establish a defense of good faith.

We have reviewed each ruling.

Some of the questions asked by Gray on direct examination were leading and suggestive; the court properly sustained objections to them. Some of the questions sought to elicit testimony which was later introduced without objection. There could be no prejudice by these rulings even if erroneous.

There were objections to many questions asked by Gray's counsel on both direct and cross-examination, which objections were sustained on grounds of materiality. Gray made no offer of proof except in one instance. Even if the rulings were erroneous, none of them involved plain error; and in the absence of plain error, a ruling, even if wrong, is not grounds for reversal.

On one occasion when the court sustained an objection, Gray asked for a side bar conference and later asked to make an offer of proof in the presence of the jury. The court properly rejected both requests.

A court has wide discretion to deny a conference or a recess when the interruption may confuse the jury or delay the trial. An offer in the presence of the jury is objectionable as an attempt to get before the jury testimony the court has already ruled to be inadmissible.

Gary also objects that the warning to his counsel by the court, outside the presence of the jury, was improper. There is no merit in this contention. The court properly admonished counsel that evidence of conversations between Gray and his counsel would put his counsel in the position of a witness and might disqualify him from arguing the case. *Law Ah Yen v. Dulles*, 257 F.2d 744, 746 (9th Cir. 1958).

C. JUDICIAL MISCONDUCT

Gray makes the same contention as Hill that the court was guilty of judicial misconduct when it made remarks about the impropriety of talking to witnesses. We discussed and denied this contention in an earlier part of this opinion.

Gray also contends that the following statement was so grossly injudicious as to require a new trial:

> Mr. Horton: I did not hear the answer, your Honor. I am sorry.
>
> The Court: I doesn't make any difference whether you heard it, Mr. Horton, it is the jury who is concerned about it.

The comment was improper. Nevertheless, we can readily understand why the capable and experienced trial judge, in the sixth day of a trial marked by frequent improper questions and

clumsy and obfuscating tactics, would make such a statement. We believe that the trial judge exercised great restraint in this long and bitterly fought trial and that his occasional show of impatience did not deprive Gray nor any of the other defendants of fair and impartial trials.

Gray also complains that the court's "extensive questioning of witnesses deprived appellant of a fair trial." This contention is also devoid of any merit. A judge should ask questions to clarify issues when, in his opinion, clarification is required, so long as he does not act as an advocate.

We have examined the record, and we are of the opinion that his questioning of the witnesses did not indicate his own feelings on the merits of the case, and he admonished the jury repeatedly that his comments were not evidence and that they were not to consider his questioning as an indication of his own feelings. *Smith v. United States*, 305 F.2d 197, 204-5 (9th Cir. 1962).

Finally, Gray argues that the court was guilty of misconduct when it responded to a question from the jury after the jury retired to consider its verdict. The question was unclear and unanswerable. The court therefore placed a question mark on the form of question and returned it to the jury. The jury sent a newer and clearer question which the court answer in writing only after it had consulted with all counsel. There was no error or even impropriety here.

D. PROSECUTORIAL MISCONDUCT

Gray asserts that the prosecutor was guilty of misconduct which requires the reversal of his conviction because, on cross-examination, the prosecutor inquired about the part played by Gray's counsel in the investment schemes. This inquiry was made without objection, and it was relevant to testimony developed on the direct examination of Gray by his own counsel. If Gray suffered any prejudice, it was the result of his own tactical decisions and not because of any prosecutorial misconduct.

The convictions of all of the defendants are affirmed.

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APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED AUGUST 10, 1976
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 75-1464

ROBERT DANIEL HILL,
aka Dan Hill,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-ppellant,

v. O R D E R

No. 75-1343

RICHARD L. GRAY,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 75-1476

CHARLES GISH,

Defendant-Appellant.

Before: WRIGHT and WALLACE, Circuit Judges, and SOLOMON, District Judge.

The panel as constituted in the above cases has voted to deny the petitions for rehearing of appellants Gish and Gray. Judges Wright and Wallace have voted to reject the en banc suggestions of appellants Gish and Gray.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

DATED:

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